

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 239 of 2016**

M/s XO Footwear Pvt. Ltd., a Company Incorporated & Registered under Companies Act, 1956, Through Sachin Kumar, S/o Shri Ashok Kumar, Age 27 years, Working as Manager Accounts having its Registered office at A-122, Mangolpuri Industrial Area, Phase-II, Delhi.

---- Petitioner**Versus**

1. Chhattisgarh State Minor Forest Produce (Trading & Development) Cooperative Federation Limited, Through its Managing Director, Having its office at A-25, VIP Estate, Near VIP Club, Khamordi, Shankar Nagar, Raipur- Chhattisgarh.
2. Footwear Design & Development Institute, Ministry of Commerce & Industry, Government of India, Through its Chief Technologist, Dr. Kaushik Ghosh, Having its office at Plot No.E-1, Sipcot Industrial Park, Irungattu Kottai, Kancheepuram (Tamilnadu)
3. Charanpaduka Industries (p) Ltd., Plot No.1462-64 MIE, Part-B, Bahadurgarh, District Jhajjar (Haryana).
4. M.B. Rubber (P) Ltd. D-13, 14, 15 & A-48/2, Site IV Industrial Area, Sahiababad, Ghaziabad (Uttar Pradesh).
5. Liberty Shoes Ltd., Libertypuram, 13th Milestone, G.T. Road, Bastara, District Karnal (Haryana).
6. Ajay Plastics Industries, 95-96, Shahzadabagh, Industrial Area, Old Rohtak Road, New Delhi.

---- Respondents

For Petitioner	:	Shri Mayank Rustagi, Shri B.P. Sharma and Shri Ali Asgar, Advocates.
For Respondent No.1	:	Shri A.S. Kachhawaha, Advocate
For Respondent No.2	:	Shri Narendra Kumar Vyas, Assistant Solicitor General
For Respondent No.4	:	Shri Kishore Bhaduri, Advocate

Hon'ble Shri Deepak Gupta, Chief Justice**Hon'ble Shri P. Sam Koshy, J.****C A V Judgment****Per Deepak Gupta, Chief Justice****03/08/2016**

1. Chhattisgarh State Minor Forest Produce (Trading & Development) Cooperative Federation Limited (hereinafter referred to as "Respondent No.1")

provides footwear to the workforce engaged in collection of forest produce. It is not disputed that Respondent No.1 got the product specifications of footwear designed from Footwear Design & Development Institute at Noida (hereinafter referred to as "FDDI, Noida"). Since 2005, tenders have been floated and the specifications have virtually remained unchanged till the last notice inviting tender issued in the year 2015. The main change was that the FDDI, Noida suggested to have durable light weight product and there should be direct moulded PU sole instead of direct injected PVC sole.

2. On 28.11.2015, Respondent No.1 issued a Notice Inviting Tender (hereinafter called 'the NIT'). The bids were invited in two parts, (a) technical bid and (b) financial bid. The bids were to be submitted by 29.12.2015. In terms of the NIT, each bidder was required to submit two pairs of sample of ladies walking chappal with direct moulded PU sole, size 4, 7 and 10. Respondent No. 1 instead of getting the samples tested from FDDI, Noida, got them tested from Respondent No. 2-Footwear Design and Development Institute, Chennai (hereinafter referred to as 'the FDDI, Chennai'). As per the report of FDDI, Chennai, the samples submitted by the Petitioner did not meet the required specifications with regard to thickness of sole (forepart) and sole abrasion. All the samples of the Petitioner were found not to conform to the standards on account of these defects.

3. The Petitioner filed the writ petition and the main challenge in the writ petition was that the FDDI, Chennai does not have the necessary equipment, knowhow or manpower to supervise, conduct and test 27 samples of 9 bidders within a short period of 9 days. The samples reached Chennai on 31.12.2015

and the test report was sent on 07.01.2016. It is alleged that the samples could not have been tested properly during this period. It is also alleged that some tests require 7 days and some require additional days and therefore, minimum 9 to 10 days are required for carrying out the tests.

4. The case of the Petitioner also is that before submitting its tender it had got the samples of its footwear tested from FDDI, Noida and the FDDI, Noida had found that the samples conformed to all standards. It is also alleged that on 17.12.2015, the FDDI Noida stated that it would take 15 days time for testing six pairs of ladies chappal and even in case of high urgency, it will take minimum of 9 days to do the needful and 50% urgent charges would have to be paid. The letter of the FDDI, Noida dated 17.12.2015 has been attached as Annexure P/5. Therefore, the Petitioner contends that the testing done by FDDI, Chennai is not proper.

5. Further, the case of the Petitioner is that it has supplied footwear to Respondent No. 1 in the year 2011-2012, 2012-2013 and 2014-2015 and there have been no complaints with regard to the footwear supplied by it. It is also urged that Dr. Kausik Ghosh, Chief Technologist, FDDI, Chennai who has signed the test report on 07.01.2016 was not actually present in Chennai on the said date and the report is manipulated. It has also been urged that FDDI, Chennai does not have any facilities to carry out chemical test and therefore the test report is obviously manipulated. It has also been urged there is cartelisation and the four successful bidders have quoted rates which are very close to each other. It is further submitted that the difference in the price is very high. The Petitioner had quoted Rs. 98.40 paise per pair, whereas, the

successful bids are approximately Rs. 150/- per pair and the loss caused to the public exchequer will be to the extent of Rs. 6,37,50,000/-. On this basis, it was prayed that the tender process initiated by the NIT dated 28.11.2015 be cancelled and an enquiry be conducted into the circumstances under which the FDDI, Chennai was chosen as Testing Lab and how the Testing Lab completed the testing process in five clear days instead of minimum 9 clear days.

6. This matter first came up before this Court on 29.01.2016 and the Respondents were asked to reply to the same. Reply affidavit was filed by Respondents No. 1 and 2. The entire original records were got produced in the Court on 03.05.2016 when the following order was passed:

“The original records have been produced. Let them be kept in sealed cover with Registrar General. Respondent No. 1 is permitted to take xerox copy of the same for official use.

Shri VS Lakda, Chief General Manager, Chhattisgarh State Minor Forest Produce (T&D) Cooperative Federation Limited, Raipur is present in Court.

Learned Counsel for Respondent No. 1 after taking instructions from him, informs us that Respondent No. 1 is ready and willing to send the second sample submitted by the Petitioner as mentioned in the order dated 4.3.2016 to the FDDI at Noida, the first of the sample having been sent to FDDI, Chennai had failed and which is the bone of controversy.

Learned Counsel for Respondent No. 1 submits that the sample shall be so sent within a period of one week. The FDDI, Noida shall make all endeavour to submit report within a maximum period of 2-3 weeks from the date that it receives samples from Respondent No. 1.”

7. It would be pertinent to mention that thereafter the Petitioner filed an application for modification of the order dated 03.05.2016 on the ground that

since the FDDI, Chennai did not have facilities for carrying out the chemical test, the samples of all the bidders should be sent for fresh testing to FDDI, Noida. We find no merit in this submission. This order was passed in presence of the Petitioner and we see no reason to modify the said order at this stage. The test report of FDDI, Noida reveals that the samples for size 4 and 7 meet all the specific requirements except “Specification requirement No. 4.11 Electrical Insulation of Sole and Specification requirement No. 4.16 Chemical Test – Phthalates”. With regard to sample for size 10, there were two other objections which are “Specification requirement No. 4.1 Strap (In-sept penetrating) and Specification requirement No. 4.9 thickness of sole (Heel Height)”.

8. The Petitioner had filed an application for setting aside the report of FDDI, Chennai dated 7.1.2016 stating that the report of the FDDI, Noida contradicts the report of FDDI, Chennai and therefore, the report of FDDI, Chennai should be rejected. In the said application, the Petitioner has prepared a comparative chart and the same is as follows:

Sl. No	Test Name	Specified Requirement	Report issued by	Sizes of Chappal			Result
				4	7	10	
COMPARISION BASED ON REPORT ISSUED BY FDDI CHENNAI Claimed Dtd. 07.01.2016							
1.	4.9 Thickness of forepart of sole-	12 mm± 2mm	FDDI Noida	11	10	10	Conforms
			FDDI Chennai	8.75	8.90	9.60	Not Conforms
2.	4.3 Abrasion Resistance of Sole	150 mm ³ max	FDDI Noida	129	101	93	Conforms
			FDDI Chennai	166	184	170	Not Conforms

COMPARISION BASED ON REPORT ISSUED BY FDDI NOIDA Dtd. 03.06.2016							
1	4.1 Strap (instep Penetrating	Minimum 20 mm	FDDI Noida	>20	>20	15MM	Not Conforms
			FDDI Chennai	>20	>20	>20	Conforms
2	4.9 Thickness of sole	25± 2 mm	FDDI Noida	25	23	19mm	Not Conforms
			FDDI Chennai	23.01	23.0	23.02	Conforms
3	4.11 Electrical Insulation of sole	100 K ohm to 1000 M ohm	FDDI Noida	1.83 G ohm	1.90 G ohm	1.84 G ohm	Not Conforms
			FDDI Chennai	910 ohm	948 ohm	930 ohm	Conforms
4	4.16 Chemical Tests (c) Phthalates	0.05%	FDDI Noida	Not Conforms	Not Conforms	Not Conforms	Not Conforms
			FDDI Chennai	Conform	Conform	Conform	Conforms

9. It is contended by Shri Mayank Rustagi, learned counsel for the Petitioner that the objections raised by FDDI, Chennai are totally wrong and this is confirmed by the report of FDDI, Noida. He further contends that the samples of the Petitioner as per FDDI, Chennai did not meet the requisite standards in relation to the thickness of forepart of the sole and abrasion resistance of sole. He submits that now the chappals meet the requirement of thickness of forepart of sole and abrasion resistance of sole. However, we find that even now all the three samples failed the test of electrical insulation of sole and also chemical test (c) Phthalates. With regard to the sample for size 10, strap (instep) penetrating does not conform of the standards and thickness of the sole is also much below the prescribed specifications. We therefore cannot accept the plea of the Petitioner that now its samples should be treated to conform to the required standards.

10. Faced with the situation, Shri Mayank Rustagi, learned counsel for the Petitioner contended that the contradiction in the test reports clearly proves the allegation of the Petitioner that the tests conducted by FDDI, Chennai were not done in a proper manner. He therefore submits that the entire tender process should be cancelled and re-tendering be done.

11. In this regard, we may point out that this footwear was to be provided by the Respondent No. 1 to the workforce engaged in the fields for plucking of tendu leaves. The footwear was to be provided before the plucking season and the said season is over. Though, there was no stay order passed by this Court, keeping in view pendency of this writ petition and the fact that the original records were in this Court, Respondent No. 1 did not issue any purchase order.

12. We are not fully satisfied with the manner in which the FDDI, Chennai has conducted the tests. It is pertinent to mention that the FDDI, both at Noida and Chennai are Government of India undertakings coming under the purview of Ministry of Commerce and Industry. The summary test report dated 07.01.2016 of the FDDI, Chennai has been filed by Respondent No. 1 and it bears the signature of Dr. Kausik Ghosh, Chief Technologist. At the bottom of the report, there is a note that “details reports of all '9' industries have been enclosed”. Out of 9 industries, samples of 5 including the Petitioner were rejected and samples of four industries were found to meet all the specifications. The sample of the Petitioner has been found not to meet the specifications with regard to thickness of sole (forepart) and sole abrasion.

13. The grievance of the Petitioner is that all these tests could not have been conducted in a short time and also that the FDDI, Chennai did not have the facilities to carry out the chemical test. It is also pointed out that Dr. Kausik Ghosh, Chief Technologist was in Delhi from 01.01.2016 till 04.01.2016 as a part of inspecting team to find out capacity of each bidder. On 06.01.2016, he was in Mumbai and left Mumbai on 08.01.2016. The Petitioner therefore questions how Dr. Kausik Ghosh could have signed the test report on 07.01.2016. It is also pointed out that the conditioning had to be done for 7 days and not for 24 hours. In this regard, reference has been made to Annexure R/2-3 filed by FDDI, Chennai itself. The contention of the Petitioner is that firstly, a sample which is sent for testing has to be prepared in terms of clause 5.10.3.1 and if it requires wet conditions then, then clause 5.10.3.2 has to be followed. Thereafter, conditioning has to be done in terms of clause 5.10.3.3 and this conditioning has to be done for seven days and the test has to be performed within five minutes of the removal of the test piece from the conditioning atmosphere. It is submitted that the samples admittedly reached FDDI, Chennai only on 31.12.2015. The report itself was prepared on 07.01.2016 and therefore, there could not have been conditioning for seven days.

14. In this regard, Dr. Kausik Ghosh has filed his affidavit and in paragraph 5, it is stated as follows:

“5. That the Laboratory of FDDI is fully equipped with latest best testing equipments and infrastructure alongwith the team of expert personnel to carry out both Physical and Chemical Testing of Leather, Textile, Fabrics, Complete Footwear, Components and Allied Materials etc.”

In paragraph 13 of the said affidavit, the procedure followed by FDDI, Chennai has been set out in a tabular form. From this table, it appears that all tests were done on 01.01.2016 or later except the electrical resistance test which was performed on 31.12.2015 and hydrolisis (sole) was done for five days between 31.12.2015 and 07.01.2016. There is no specific answer as to why the conditioning was not done for seven days. Another affidavit was also filed by the Petitioner and it was urged that tests of all the samples could not have been carried out simultaneously and the schedule of testing mentioned in the affidavit of Dr. Kausik Ghosh was not correct.

15. The Petitioner also raised doubts about the signing of the report by Dr. Kausik Ghosh on 07.01.2016 since admittedly he was not in Chennai on that day. Dr. Kausik Ghosh stated in his affidavit that in fact only summary of the report had been conveyed on 07.01.2016 and that he had signed the report on 11.01.2016. He also states that the complete report was handed over at Raipur only on 11.01.2016 in person. It is apparent that this statement of Dr. Kausik Ghosh is not correct.

16. We have carefully perused the report which has been attached by Respondent No. 1 and this clearly shows that the report was dated 07.01.2016 and Dr. Kausik Ghosh had signed below the report. He has not put any other date. These are manual signatures and not scanned signatures. This clearly indicates that the report was signed on 07.01.2016 and there is a note that “details reports of all '9' industries have been enclosed”. If Dr. Kausik Ghosh had not signed the report on 07.01.2016 and had signed on 11.01.2016 as stated by him, he should have been careful enough to mention the date of 11.01.2016 below his signature. He is the Chief Technologist of FDDI,

Chennai and should have ensured that the document is properly dated. His explanation that only summary was sent by e-mail is also false since what has been produced by the Respondents is a complete report signed by Dr. Ghosh which carries the date 07.01.2016. There is no explanation how the report alongwith "details reports of all 9 industries" was sent on 07.01.2016 when Dr. Kausik Ghosh was not there at Chennai on the said date.

17. Reports issued by such Laboratories are normally accepted by the Courts without questioning their correctness. However, in this case, the manner in which the report has been submitted creates doubt with regard to correctness thereof. There are various types of tests to be conducted and even as per the procedure which has been attached alongwith the affidavit of Dr. Kausik Ghosh, it is not possible to simultaneously carry out the tests. One must remember that each bidder was required to submit alongwith the tender two pairs of each samples of size 4, 7 and 10 i.e. total of six pairs. Out of this, one pair of each size i.e. six chappals of each manufacturer was sent to the FDDI, Chennai. It however appears that in fact only one chappal of each size was sent to Chennai because in the report dated 07.01.2016, the subject was "Test Report Summary of 27 PU Chappal Samples". This means that there was only 27 chappals available with the Laboratory at FDDI, Chennai i.e 3 chappals of each bidder. The tests are of different types and when one of the tests requires that the chappal has to be conditioned in a particular atmosphere for 7 days, then the chappal has to be kept in that atmosphere for 7 days and could not be sent out of the lab. It is also apparent from the letter of the FDDI, Noida which clearly shows that it takes minimum 9 days to

conduct all the tests. Hydrolysis test on the sole itself takes 6 days as per the communication dated 16.12.2015 sent by FDDI, Noida. Test for Electrical Insulation of sole in dry and wet conditions takes 8 days. This much time was not available with the FDDI, Chennai.

18. In fact the Respondents themselves constituted a committee vide order dated 12.02.2016 to enquire into the matter related to Inspection & Testing Services for Tendupatta Pluckers of Respondent No. 1. With regard to capacity of FDDI, Chennai, the committee gave its report that the FDDI, Chennai was found to be adequate to carry out specific tests of tender documents **except the chemical tests recommended**. In this report itself, it is mentioned that the tests can be conducted in seven days as the lengthiest test is the electric resistance test for which 7 days are required. But the report acknowledges the fact that FDDI, Noida in its communication dated 17.12.2015 has mentioned that minimum 9 (7+2) days are required to conduct the tests. It is also proved from the report that the samples were received at FDDI, Chennai on 31.12.2015. However, the report is not clear as to at what time the samples reached FDDI, Chennai. The relevant portion of the report is as follows:

“IV. As per the tender specification provided by Chhattisgarh State Minor Forest Produce (Trading & Development) Co-operative Federation Limited the tests can be conducted in 7 days' time as the lengthiest test is Electrical Resistance Test for which 7 days conditioning is required in a particular atmosphere and test shall be performed within 5 minutes of removal of test piece from the conditioning atmosphere, if the test is not carried out in that atmosphere.

As all the submitted samples were found to be consumed during the process of testing, hence test re-test could not

be conducted to verify the reports.

In case of availability of more samples with Chhattisgarh State Minor Forest Produce (Trading and Development) Co-operative Federation Limited re-testing can be carried out.

4. The fact cannot be denied that the test results of a sample tested at two different laboratories cannot differ in the values report by each lab.”

19. Assuming for the sake of arguments that the tests could have been conducted within 7 days but as mentioned in this report, the electrical resistance test requires 7 days conditioning. This means that the sample had to be kept in a particular condition, obviously within the laboratory for seven days. Admittedly, the FDDI, Chennai does not have the facilities to carry out the chemical tests. It is not disputed that chemical tests were required to be carried out. The case of FDDI, Chennai is that it outsourced the work for chemical tests. In our opinion, this is highly improper. If the FDDI, Chennai did not have the facilities to carry out any test, then it should have informed Respondent No. 1 that it does not have these facilities and that it would be getting these tests done from some other laboratory. In the test report, neither this fact was mentioned nor there is any whisper that these tests were outsourced. There is no mention as to which laboratory carried out the chemical test and therefore it cannot even be verified whether such laboratory had the necessary wherewithal to carry out necessary tests. We therefore have grave doubts with regard to the correctness and veracity of the tests.

20. It is true that we normally do not sit over the reports of the experts. But in this case, the Respondents themselves constituted a committee to enquire into the matter and report of the committee itself discloses that the FDDI, Chennai

does not have adequate facilities to carry out chemical tests. We also find that the manner in which the report has been signed on 07.01.2016, which is now stated to be signed on 11.01.2016, is not proper. This is a document of great importance and if the head of the Institution is signing a document on a date later to the date on which it is prepared, either he should correct the date on the document itself or below his signature, he should clearly put the date to show that on which date it was signed. Admittedly, Dr. Kausik Ghosh is the head of FDDI, Chennai. For most of the period when these tests were conducted, he was not in Chennai. No material has been placed by FDDI, Chennai giving the names of the persons who carried out the tests, especially the chemical test for which admittedly there are no facilities. We also find that after this Court passed an order on 03.05.2016, tests were conducted by FDDI, Noida and the tests reports are much more detailed and signed firstly by the Scientists who carried out the tests and then co-signed by the Chief Scientist of the Laboratory. This aspect is missing in the report of the FDDI, Chennai. The FDDI, Noida has given separate test certificates with regard to each type of test(s) conducted and we fail to understand why the same procedure could not have been followed by the FDDI, Chennai.

21. We may point out that we find no defect in the system followed by Respondent No. 1. Reckless allegations have been made by the Petitioner against the officials of Respondent No. 1 that they were in connivance with the successful bidders and therefore the samples were sent to FDDI, Chennai instead of FDDI, Noida. We find no merit in this submission. The FDDI, Chennai is also an undertaking of the Government of India. After going

through the entire documents, we feel the procedure followed by Respondent No. 1 is absolutely just and proper.

22. In view of the above discussion, we are clearly of the view that the manner in which the FDDI, Chennai conducted the tests and submitted its report leaves much to be desired. We have already made detailed observations in this regard above. We also find that the difference in the rates is very high.

23. In view of the above discussion, we are clearly of the view that FDDI, Chennai did not act in the manner expected of a Government Laboratory. It did not conduct tests properly. The tests have been conducted in a time which is less than the minimum period required. The chemical tests were got conducted outside and therefore, we have no option but to set aside the report submitted by FDDI, Chennai (Annexure- R-1/3).

24. This brings us to the issue as to what relief should be granted in this case. We have held that the tender process other than the testing by the laboratory at Chennai is legal and proper. We are, however, not satisfied with the report of the laboratory at Chennai. We therefore, direct that the samples of other successful bidders, namely, Respondents No. 3, 4, 5 and 6 shall be sent to some other laboratory (which may include FDDI, Noida) for testing. We are not directing sending of other samples because other than the Petitioner, none of the other companies had approached us. In case, the samples submitted by the Respondents No. 3, 4, 5 and 6 on re-testing are found to meet the required standards, then Respondent No. 1 is free to place orders on them. However, if their samples fail to pass necessary tests, then Respondent

No. 1 shall have to issue fresh tender for supply of footwear. As far as the Petitioner is concerned, no relief can be granted to it in this behalf because its samples have failed not only at FDDI, Chennai, but also at FDDI, Noida.

25. The writ petition is disposed of in the aforesaid terms. No order as to costs.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE